

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**





# 77-1383

To be argued by  
JEREMY G. EPSTEIN

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## United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1383

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UNITED STATES OF AMERICA,

*Appellee,*

—v.—

ARTHUR McAVOY,

*Defendant-Appellant.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

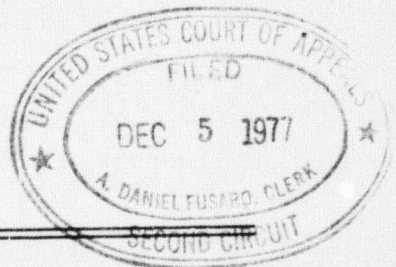
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### BRIEF FOR THE UNITED STATES OF AMERICA

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*Defendant-Appellant.*

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**BRIEF FOR THE UNITED STATES OF AMERICA**

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**Preliminary Statement**

Arthur McAvoy appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on July 1, 1977, after a four day trial before the Honorable Morris E. Lasker, United States District Judge, and a jury.

Indictment 75 Cr. 437, filed May 2, 1975, charged McAvoy, Peter Quinn and Gilberto Schmidt in Count One with robbery of the People's Bank for Savings, 110 Chatsworth Avenue, Larchmont, New York, in violation of Title 18, United States Code, Section 2113(a). The indictment further charged McAvoy and Quinn in Count Two with armed robbery of that same bank in violation of Title 18, United States Code, Section 2113(d). Counts Three and Four charged both McAvoy and Quinn with robbery (Count Three) and armed robbery (Count Four) of the Barclays Bank of New York, 491 Main Street,



New Rochelle, New York, also in violation of 18 U.S.C. §§ 2113(a) and (d). Counts Five and Six charged McAvoy and Quinn with robbery (Count Five) and armed robbery (Count Six) of the Chase Manhattan Bank, 45 Quaker Ridge Road, New Rochelle, New York.\*

Trial commenced against McAvoy and Quinn as to Counts One, Two, Five and Six on June 24, 1975.\*\* On June 25, 1975, Quinn pleaded guilty to Counts Five and Six.\*\*\* On June 27, 1975, McAvoy was found guilty on all counts on which he was tried.

On July 29, 1975, Judge Lasker committed McAvoy for a period of observation and study pursuant to the provisions of 18 U.S.C. § 4208(c) and imposed the provisional maximum term of imprisonment of fifty years pursuant to 18 U.S.C. § 4208(b). On July 1, 1977,\*\*\*\* Judge Lasker imposed a final sentence of five years' imprisonment on Counts One and Two, to be followed by

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\* That indictment superseded Indictment 75 Cr. 214, filed March 3, 1975, which charged McAvoy and Quinn, named therein as "John Doe a/k/a Pete", with robbery and armed robbery of the People's Bank for Savings only.

\*\* The trial of Schmidt was severed. Superseding Indictment 75 Cr. 825 was filed against Schmidt on August 14, 1975 and Indictment 75 Cr. 437 was dismissed as against him by the filing of a *nolle prosequi*. Schmidt was tried on Indictment 75 Cr. 825 and acquitted.

\*\*\* On December 3, 1975, Quinn was sentenced to a term of five years' imprisonment.

\*\*\*\* The long interval between the preliminary and final sentence was caused primarily by McAvoy's poor physical condition, which required a series of operations and which prevented his attendance at court. Another cause of delay was the filing of several motions by George Haber, Esq., McAvoy's lawyer, which were withdrawn when Haber was replaced by other counsel.



five years' probation on Counts Five and Six.\* McAvoy is now serving that sentence.

## **Statement of Facts**

### **The Government's Case**

#### **A. The People's Bank for Savings Robbery**

On January 24, 1975, Arthur McAvoy and Peter Quinn met Christine Klein, McAvoy's girlfriend, and Gilberto Schmidt at a place called "Satch's" in Queens. McAvoy asked Schmidt to drive him and Quinn to Westchester County, where Quinn was to meet a lawyer. They also promised Schmidt, a drug addict, that they would give him something "to get high." Schmidt finally agreed, and drove McAvoy, Quinn, and Klein to Westchester County. (Tr. 129-30).\*\*

On the way, McAvoy directed Schmidt to stop near a diner. After Schmidt stopped, McAvoy walked over to a parked car, removed a shotgun, and placed it in the back of Schmidt's car. They then drove on until they reached Chatsworth Avenue in Larchmont. At that point McAvoy announced that "that is the place" and directed Schmidt to park in a nearby lot. (Tr. 130-32, 189-90).

Once the car was parked, McAvoy and Quinn put on wigs. After directing Schmidt and Klein to wait for them with the motor running, they left the car. They entered the People's Bank for Savings, 110 Chatsworth Avenue, which was adjacent to the parking lot, at approximately 2:45 p.m. Quinn first approached a teller, Leslie Nixon, and asked for change of a quarter and some

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\* Counts Three and Four, which had been severed prior to trial, were dismissed on McAvoy's motion.

\*\* "Tr." refers to the trial transcript; "GX" refers to Government Exhibit; "Br." refers to appellant's brief.

penny wrappers. McAvoy then approached another teller, drew a gun, and demanded money. Quinn then handed a flight bag to Nixon, which she filled with approximately \$4,814.50. (Tr. 9-13, 14-17, 22-24, 133, 135; GX 1-13A).\*

McAvoy and Quinn ran from the bank, re-entered Schmidt's car, and drove off. A bank employee, Donald Allen, followed the men out of the bank and saw one of them remove what he took to be a wig from his head before entering the car. A bystander, Mark Taylor, noted the number of Schmidt's license plate. (Tr. 23-24, 26-29, 133).

On the way back to New York, Schmidt was given \$500 from the proceeds of the robbery and Klein \$200. Schmidt left McAvoy, Quinn, and Klein in Queens and returned to his home in New Jersey. (Tr. 133-34, 190-98).

## **B. The Chase Manhattan Bank Robbery**

On March 14, 1975, at approximately 2:50 p.m., McAvoy, Quinn and Michael Jimison entered a branch of the Chase Manhattan Bank, 45 Quaker Ridge Road, New Rochelle, New York. Quinn first approached a teller, Carol Revet, and asked for change of a dollar. After receiving it he again approached Miss Revet and placed a pistol and a bag before her. He then instructed her to fill the bag with money. Jimison simultaneously approached another teller, Ann Ward, handed her a bag, and gave her a similar instruction. While Quinn and Jimison were standing at the teller's counters, McAvoy stood in the rear of the bank, pacing back and forth.

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\* During the robbery a surveillance camera behind the teller's counter was activated and the resulting photographs were introduced in evidence as Government Exhibits 1-13A.



After the tellers had filled the bags with approximately \$7,206, the three men left the bank. (Tr. 58-64, 93-95, 101-104; GX 15-55\*).

During the robbery McAvoy left on the teller's counter a passport application signed by Donald Harrison Craigie. Approximately one month earlier, on February 11, 1975, McAvoy had introduced himself to William Ciccossanti, a resident of West Haven, Connecticut, as Donald H. Craigie. (Tr. 126-27, 151, 175-77; GX 56).

### **C. The Marine Midland Bank Robbery**

The Government also introduced evidence that McAvoy had committed another bank robbery not charged in the indictment. On December 20, 1974, McAvoy was interviewed in the offices of the Ft. Lee, New Jersey, Police Department by George Wisnovsky, an FBI Agent. After being advised of his rights, he admitted to Wisnovsky that he had robbed a branch of the Marine Midland Bank in Mamaroneck, New York on December 17, 1974. McAvoy stated that he had entered the bank alone shortly before 3:00 p.m. on that day. He drew a gun, announced a holdup, and obtained between \$8,000 and \$9,000 from the tellers. He locked several female employees of the bank in the bank vault and handcuffed a male employee to the vault door. He then drove off in a van which he had parked near the bank. (Tr. 179-81).

### **D. McAvoy's Arrest**

On March 21, 1975, McAvoy was arrested by FBI agents in a room at the Seville Hotel on the east side of Manhattan. With McAvoy at the time was Christine

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\* A surveillance camera over the door of the bank was activated during the robbery and certain of the photographs taken were introduced as Government Exhibits 15-55.



Klein, who was also arrested. McAvoy was advised of his rights and was asked for permission to search the hotel room. After McAvoy gave permission, the agents found a loaded automatic pistol in the pocket of McAvoy's jacket. They also found a key to a locker at the Port Authority Bus Terminal. McAvoy consented to a search of the locker, which was later found to contain, *inter alia*, a loaded .22 caliber revolver. (Tr. 240-45; GX 61A, 61B, 62A, 62B).

On the following day, March 22, 1975, McAvoy was taken to the United States Courthouse for arraignment. During an interview with an Assistant United States Attorney he stated that if his girlfriend, Christine Klein, were freed of all charges, he would tell the Government about the eight bank robberies he had committed. (Tr. 245-47).

### **The Defense Case**

McAvoy offered no evidence.

## **ARGUMENT**

### **POINT I**

#### **The Trial Court's Charge on the Elements of 18 U.S.C. § 2113(d) Was Not Erroneous.**

McAvoy first argues that his conviction on the two armed robbery counts must be vacated because of defects in the trial court's charge. He claims that Judge Lasker failed to instruct the jury that before it could convict a defendant under 18 U.S.C. § 2113(d), it had to find that he possessed an objective capacity to inflict physical harm. No such objection to the charge was

articulated by defense counsel at trial. Indeed, defense counsel specifically abandoned any objection to this portion of the charge. He stated: "There was something about the use of a deadly weapon during the commission of the bank robbery that just didn't sit right with me but unfortunately I can't think of anything to correct it so maybe I ought to leave it alone." (Tr. 327). He later said, "There was no evidence the guns were operable. I am not sure. I don't know whether I am on safe grounds so I will not urge it." (*Id.*) Thus, absent plain error, McAvoy's argument is barred at the threshold by Rule 30 of the Federal Rules of Criminal Procedure. See *United States v. Magnano*, 543 F.2d 431, 435 (2d Cir. 1976), *cert. denied*, 429 U.S. 1091 (1977); *United States v. Araujo*, 539 F.2d 297, 291 (2d Cir. 1976); *United States v. Dixon*, 536 F.2d 1388, 1397 (2d Cir. 1976).\*

In any event, the District Court's charge on Section 2113(d) was not erroneous. Section 2113(d) provides that

"Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than \$10,000 or imprisoned not more than twenty-five years, or both."

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\* Moreover, McAvoy's counsel had ample notice of the proposed charge on Section 2113(d). The Government's requests to charge had been served upon him prior to trial and Judge Lasker stated prior to delivering the charge that he intended to grant the Government's requests. (Tr. 303). He then gave McAvoy the opportunity to object or make alternative requests, and his counsel made no mention of the Section 2113(d) instruction. (Tr. 304).



The statute has two distinct parts. It makes guilty of a crime "whoever . . . assaults any person" as well as "whoever . . . puts in jeopardy the life of any person by the use of a dangerous weapon or device." It has been widely held that these parts must be read disjunctively, so that the "assault" portion is not modified by the phrase "by the use of a dangerous weapon or device." *United States v. Beasley*, 438 F.2d 1279, 1282 (6th Cir.), *cert. denied*, 404 U.S. 866 (1971); *United States v. Rizzo*, 409 F.2d 400, 402 (7th Cir. 1969), *cert. denied*, 396 U.S. 911 (1969); *Gant v. United States*, 161 F.2d 793, 796 (5th Cir. 1947); *United States v. Murray*, 149 F.2d 932, 933 (3rd Cir. 1945). It follows that the trial court is obligated to instruct the jury on both portions of the statute if, as here, both were charged in the indictment. The portion of Judge Lasker's charge which McAvoy finds objectionable, in which reference is made to an "apparent ability" to carry out a threat of harm, comes from that part of the charge that defines the "assault" portion of the statute. This Court's decision in *United States v. Marshall*, 427 F.2d 434 (2d Cir. 1970) on which McAvoy relies, offers no guidance on the proper definition of "assault" under § 2113(d), because the indictment in that case charged only that the defendants placed the lives of others in jeopardy. 427 F.2d at 435. Accordingly, this Court's discussion, and its conclusion that conviction under § 2113(d) required finding an objective capacity to inflict harm, concerned only the second section of the statute. The "assault" portion was never discussed.

Taken as a whole, Judge Lasker's definition of the assault portion of the statute (Tr. 319-20) was entirely proper. It adhered closely to the proposed instruction in 2 Devitt and Blackmar, *Federal Jury Instructions*, § 44.07 (3rd ed. 1977), as well as to the instructions cited with approval in *United States v. Newkirk*, 481 F.2d 881, 883, n.1 (4th Cir. 1973), *cert. denied*, 414 U.S. 1145 (1974).



and *United States v. Rizzo*, *supra*, 409 F.2d at 401-03.\* Furthermore, Judge Lasker's explanation accords with recognized common law concepts of criminal assault. See

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\* In pertinent part, Judge Lasker charged as follows:

"Now, the word 'assault' is defined to include an unlawful attempt or threat to apply force or violence or to inflict bodily injury when the attempt or threat is coupled with the apparent ability to carry it out then and there; so that it arouses a fear in the intended threatened victim that he or she will be subject to immediate physical injury. An assault as it is defined in law may be committed without actually touching or striking or doing bodily harm to the person in question. Indeed, if I were to come up with you and shake my fist in your face in such a manner that you reasonably and objectively believed that I could and would hit you and strike you, that could be an assault and for example, to speak in terms of the problem we have at hand, the flourishing or pointing or showing of a pistol or gun at another person for the purpose of putting that other person in fear would be sufficient to constitute an assault." (Tr. 319-20).

In *United States v. Newkirk*, *supra*, 481 F.2d at 883, n.1, the following instruction was approved:

"Now, any willful attempt or threat to inflict injury upon the person of another, when coupled with an apparent present ability to do so, or any intentional display of force such as would give the victim reason to fear or expect immediate bodily harm, constitutes an assault.

"So, a person who has the apparent present ability to inflict bodily harm or injury upon another person, and willfully attempts or even threatens to inflict such bodily harm, as by intentionally flourishing or pointing a pistol or gun at another person, may be found to have assaulted such person."

A similar instruction was approved in *United States v. Rizzo*, *supra*, 409 F.2d at 402-403:

"Any willful attempt or threat to inflict injury upon the person of another, when coupled with an apparent present ability to do so, and an intentional display of force such as would give the victim reason to fear or expect immediate bodily harm, constitutes an assault. An assault may be

[Footnote continued on following page]

*United States v. Rizzo*, *supra*, 409 F.2d at 403; *Ladner v. United States*, 358 U.S. 169, 177 (1958). In *Ladner*, the Supreme Court held that "an assault is ordinarily held to be committed merely by putting another in apprehension of harm whether or not the actor actually intends to inflict or is capable of inflicting that harm." 358 U.S. at 177. McAvoy has cited no cases disapproving the use of the common law definition of criminal assault, and we submit that its use by Judge Lasker was entirely proper.

Judge Lasker's instruction on the second portion of Section 2113(d) satisfied this Court's requirement in *United States v. Marshall*, *supra*, that one convicted of placing lives in jeopardy under this statute possess the objective capacity to inflict bodily harm. McAvoy misstates the holding of *Marshall* when he asserts that "the Government must prove, and the jurors find, that any weapon used is loaded and capable of firing." (Br. 12). The Government need only show that firearms were used during the commission of the robbery; the jury is then entitled to infer that the firearms were loaded and operable. *United States v. Marshall*, *supra*, 427 F.2d at 437. Judge Lasker instructed the jury in accordance with the requirements of *Marshall*. He charged that

"you must be convinced beyond a reasonable doubt that the defendant under question carried one or more firearms or that he aided and abetted a co-defendant to do so. It is not essential to such a

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committed without actually touching, or striking, or doing bodily harm to the person of another.

"So, a person who has the apparent present ability to inflict bodily harm or injury upon another person, and willfully attempts or even threatens to inflict such bodily harm, as by intentionally flourishing or pointing a pistol or gun at another person, may be found to have assaulted such person."



finding that there be direct evidence that shows the firearm was loaded in fact. If a person is engaged in a robbery and does place or points a gun to insure his demand and intends to produce a fear in a person or persons, the jury is permitted to infer that from these facts the gun was loaded and capable of inflicting the deadly injury threatened by the one who employed it." (Tr. 320-21).

Judge Lasker did not, as McAvoy suggests, instruct the jury that the simple possession of a firearm, whether or not operable, would be sufficient for conviction. His instruction clearly conveyed to the jury that the firearm had to be "capable of inflicting . . . deadly injury" (Tr. 321) as *Marshall* requires.

Whatever the defects in the trial court's charge, the error, if any, was most certainly harmless. The controlling authority here is *United States v. Stewart*, 513 F.2d 957, 960 (2d Cir. 1975). There the trial judge had failed to instruct the jury that a violation of § 2113(d) required a finding of an objective capacity to inflict physical harm. This Court, however, found the error to be harmless, stating as follows:

"However, in *Marshall* we also indicated that such error would be harmless if the evidence showed that the persons threatened had in fact been in danger. 427 F.2d at 438. Here there was uncontroverted testimony that two of the robbers (Williams and Ruddock) were armed. Thus, the bystanders and bank employees at the scene of the robbery were objectively in jeopardy." 513 F.2d at 960.

The evidence that McAvoy and his colleagues were armed in the two bank robberies charged here is equally uncontroverted. The surveillance photographs taken in each robbery show clearly that guns were used, and em-



ployees of both banks testified that they saw guns carried by the robbers. This is not a case, like *Marshall*, where the defense introduced some evidence that the guns used were unloaded; but for that evidence, this Court would have held the omission of the requisite instruction in *Marshall* harmless as well. McAvoy attempts to bring this case within the ambit of *Marshall* by arguing that he confessed only to the use of an unloaded weapon, and that one of the tellers described the weapon he carried in the People's Bank robbery as resembling a "toy pistol." (Br. 14). Both of these arguments miss the mark. First, McAvoy admitted carrying an unloaded weapon only in the Marine Midland Bank robbery, which was not charged in this indictment but merely proven as a similar act. Second, one of the guns recovered from McAvoy after his arrest on March 21, 1975 was a small .22 caliber revolver (GX 62A), which resembles a toy but is not. We submit that the evidence supports overwhelmingly the probability that McAvoy's guns were loaded and operable. Both of the guns recovered from him after his March 21 arrest, the .22 caliber revolver (GX 62A) and the automatic (GX 61A), were fully loaded when found. Further, on January 25, 1975, one day after the People's Bank robbery, McAvoy told Schmidt that he was prepared to "shoot it out" with the FBI. (Tr. 135). The jury was thus entitled to infer that McAvoy's guns were loaded not only because of the presumption held permissible in *Marshall* but because of the undisputed evidence that within days of each of the bank robberies, McAvoy did possess loaded weapons.

We think it worth noting in conclusion that the operability of McAvoy's weapon was never at issue at the trial. The only issue before the jury, as Judge Lasker observed at the time of sentence, was whether McAvoy was among those who robbed the two banks. (Tr. of July 1, 1977 at p. 23). The alleged infirmity in the trial

court's charge was never brought to his attention, and could not have conceivably influenced the jury's deliberations. The evidence is compelling, if not overwhelming, that McAvoy committed these robberies with loaded guns. Any arguable defect in Judge Lasker's charge was thus unquestionably harmless. See *United States v. Stewart*, 513 F.2d at 960.

## POINT II

### **The Trial Court Did Not Err in Failing to Instruct the Jury to Evaluate the Voluntariness of McAvoy's Confession.**

At the trial the Government proved, through the testimony of an FBI agent, that McAvoy had confessed to a bank robbery not charged in the indictment, committed at the Marine Midland Bank on December 17, 1974. McAvoy contends that Judge Lasker failed to instruct the jury that it was entitled to evaluate the voluntariness of this confession, as required by 18 U.S.C. § 3501(a), and claims that this failure constituted reversible error. See *United States v. Barry*, 518 F.2d 342 (2d Cir. 1975). The Government submits that no such charge was required here and, even if one was required, its omission was harmless.

In *United States v. Barry*, *supra*, this Court held that a trial judge was required to instruct the jury to evaluate the voluntariness of a confession in accordance with the requirements of 18 U.S.C. § 3501(a). Judge Lasker gave no such instruction here.\* However, decisions following *Barry* have held that a § 3501(a) charge is *not* required when the defense fails to contest the voluntari-

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\* Judge Lasker's omission can be most readily explained by the fact that *Barry* was decided on June 18, 1975, eight days before the charge was delivered.



ness of the confession. In *United States v. Diop*, 546 F.2d 484 (2d Cir. 1976), this Court held that no charge pursuant to § 3501(a) was necessary when the defendant made no claim before the jury that his confession was involuntary. 546 F.2d at 486-487. See also *United States v. Lewis*, Dkt. No. 77-1224, slip op. 451, 459-60 (2d Cir., Nov. 21, 1977); *United States v. Fuentes*, Dkt. No. 77-1083, slip op. 5883, 5897-99 (2d Cir., Sept. 14, 1977). Similarly, in *United States v. Cowden*, 545 F.2d 257 (1st Cir. 1976), *cert. denied*, 430 U.S. 909 (1977), no instruction was deemed necessary where the defendant "neither offered evidence to the jury indicating that he was challenging the voluntariness of his statements . . . nor made a claim of involuntariness in the jury's presence." 545 F.2d at 267. The Court concluded that "we do not read section 3501(a) as requiring a ritual instruction where no identifiable issue of voluntariness exists." *Id.* Thus, the introduction of a confession does not *ipso facto* require a § 3501(a) charge; such a charge is mandated only where the defense has made voluntariness an issue.\*

The present case falls squarely within the ambit of *Diop*, *Lewis*, and *Fuentes*. No evidence was presented to the jury suggesting that McAvoy's confession was involuntarily given, and no such argument was made to the jury in summation. See *United States v. Fuentes*, *supra*, slip op. at 5898. It is true that during the hearing outside the jury's presence McAvoy testified that his confession was the product of a "deal" (Tr. 167-69) and his counsel questioned extensively the FBI agent who took the confession about McAvoy's state of mind (Tr. 160-66). However, the cross-examination of the agent in the jury's

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\* As the First Circuit points out in *Cowden*, "the instruction requirement in Section 3501(a) has to be read with the earlier admonition in the subsection that if the court admits a confession it 'shall permit the jury to hear relevant evidence on the issue of voluntariness.'" 545 F.2d at 267. Thus if the jury hears no relevant evidence, it follows that there is no necessity for instructing them on how to determine whether a confession is voluntary.



presence never touched upon McAvoy's supposed mental disability at the time of the confession. Indeed, defense counsel asked the agent only two questions about the confession: whether it was tape recorded and whether it was transcribed and signed. (Tr. 183). Nor did McAvoy testify before the jury that he was misled into giving the confession. As in *Diop* and *Fuentes*, there was nothing before the jury that required a determination of voluntariness, and under the reasoning of those cases, the issue of voluntariness was not sufficiently raised to require a § 3501(a) instruction.\*

Even assuming that a § 3501(a) instruction was required, its omission here was surely harmless error. The confession introduced pertained only to the Marine Midland Bank robbery of December 17, 1974, which was not charged in the indictment and which was introduced only as a similar act. It could not have weighed decisively in the jury's determination of McAvoy's guilt on the two bank robberies for which he was tried. The similar act evidence was scarcely the linchpin of the Government's case, and it was accorded little emphasis in the Government's presentation. All of the evidence introduced on the point consisted of approximately four pages of direct testimony (Tr. 177-81) and one-third of a page of cross-examination (Tr. 183). The prosecutor devoted one page of a twenty page summation to the evidence. (Tr. 273-74). Moreover, the jury had ample evidence

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\* Also instructive here is *United States v. Lucchetti*, 533 F.2d 28 (2d Cir.) cert. denied, 429 U.S. 849 (1976). This Court held that the issue of voluntariness had been sufficiently raised by the Government's evidence concerning the defendant's confession that a § 3501(a) instruction was required. However, the defendant "offered no evidence at trial from which the jury could have inferred that the confessions were anything but voluntary. Conspicuously absent from the evidence at trial were any of the contentions raised by [defendant] at the suppression hearing . . ." 533 F.2d at 40. This Court thus held the omission of the instruction harmless error. The quoted language is equally applicable here.

that was strongly probative of McAvoy's guilt on the robberies for which he was charged. The evidence consisted of the testimony of two accomplices, Christine Klein \* and Gilberto Schmidt, bank surveillance photographs,\*\* two loaded pistols discovered in McAvoy's possession, one of which resembled the gun used in a robbery, and a passport application left behind in one robbery that bore a name that McAvoy had used only a month earlier. Indeed, Judge Lasker observed to McAvoy at the close of the evidence that "[t]o be perfectly blunt about it, I don't think you have a very strong case here." This case thus bears not the slightest resemblance to *United States v. Barry, supra*, where the confession was needed to bolster an otherwise weak Government case that consisted solely of the testimony of a single accomplice. As the *Barry* court noted, "the yardstick by which prejudice must be measured is our appraisal of the impact of the error on the jury." 518 F.2d at 348. In *Barry* the impact of the confession was substantial, and thus the failure to instruct as to voluntariness materially prejudiced the defendant's case. Here the impact of the confession, when considered with the Government's other proof, was slight, and Judge Lasker's failure to deliver a voluntariness instruction was surely of little consequence. See *United States v. Fuentes, supra*, slip op. at 5899.

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\* Klein's testimony was particularly probative because as McAvoy's girlfriend she had no motive whatever to give testimony favorable to the Government. Indeed, she sought strenuously to avoid testifying. She refused to respond to a subpoena and was arrested on a material witness warrant. (Tr. 186). At trial, she initially refused to inculcate McAvoy and then gave inculpatory testimony only when confronted by the prosecutor with her prior testimony before the grand jury.

\*\* McAvoy was disguised during the robberies, but the Chase Manhattan Bank surveillance photographs showed him wearing the same jacket that he wore to court during the trial. (Tr. 272).



**POINT III****The Trial Court's Instruction to the Jury Following the Guilty Plea of McAvoy's Co-Defendant Was Proper.**

On the second day of the trial, Quinn, McAvoy's co-defendant, entered pleas of guilty to Counts Five and Six of the indictment. McAvoy claims that Judge Lasker erred in advising the jury that Quinn pleaded guilty without also cautioning that Quinn's plea was no evidence of McAvoy's guilt. The argument is both factually and legally erroneous.

A sufficient response to McAvoy's argument can be found in the text of Judge Lasker's instruction, which McAvoy never quotes:

"Before we continue to hear witnesses, I have an announcement to make. The case of Mr. Quinn has been disposed of without the necessity of the jury determining it.

I want to caution you, however, that all of the remarks I made at the commencement of this trial continue to apply; that Mr. McAvoy is presumed innocent of the charges and that presumption remains until and unless at the end of the trial you shall unanimously agree the government has proven any of the charges against him beyond a reasonable doubt." (Tr. 123-24).

Furthermore, in his charge, Judge Lasker instructed the jury as follows:

"In the determination of innocence or guilt, you must bear in mind that guilt is personal. The guilt or innocence of Mr. McAvoy must be determined separately with respect to him solely on the



evidence presented against him or the lack of evidence. The case of any defendant stands or falls upon the proof or lack of proof of the charge against him and not against somebody else." (Tr. 315-16).

It is thus abundantly clear that Judge Lasker never advised the jury that Quinn pleaded guilty, as McAvoy alleges; he simply advised that his case had been "disposed of," a phrase that does not, to a layman, point ineluctably toward a plea of guilty. Furthermore, defense counsel made no objection to the court's remarks concerning Quinn, and his failure to raise the point below or to request an additional cautionary instruction precludes any objection in this Court. *United States v. Rothman*, 463 F.2d 488, 490 (2d Cir.), *cert. denied*, 409 U.S. 956 (1972); see generally *United States v. Magnano*, 543 F.2d 431, 435 (2d Cir. 1976), *cert. denied*, 429 U.S. 1091 (1977); *United States v. Ingenito*, 531 F.2d 1174, 1176 (2d Cir.), *cert. denied*, 426 U.S. 939 (1976).

Even if it is assumed that Judge Lasker's remarks conveyed to the jury that Quinn had entered a guilty plea, such remarks were not improper and were not prejudicial to McAvoy. This Court has observed that "in the natural course of events guilty pleas during joint trials are to be anticipated," *United States v. Toliver*, 541 F.2d 958, 967 (2d Cir. 1976). Thus, advising a jury that a co-defendant has pleaded guilty is not improper so long as appropriate cautionary instructions are given.\* The instructions Judge Lasker gave the jury, quoted above, were entirely adequate; they can in no way be

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\* Indeed, it has even been held proper for a co-defendant to enter a guilty plea in the jury's presence. *United States v. Aronson*, 319 F.2d 48, 52 (2d Cir. 1963); *United States v. Crosby*, 294 F.2d 928, 948 (2d Cir. 1961).

read to suggest that Quinn's guilt might be imputed to McAvoy.

Finally, this Court has found no error in cases where guilty pleas were entered under circumstances far more potentially prejudicial than in this case. In *United States v. Toliver, supra*, and *United States v. Price*, 447 F.2d 23 (2d Cir.), *cert. denied*, 404 U.S. 912 (1971), a co-defendant pleaded guilty after the commencement of the trial and then testified on behalf of the Government. The only cautionary instruction given the jury was that they were to scrutinize the testimony of accomplices with care. Even under these circumstances, this Court found no prejudice to the defendant. *United States v. Price, supra*, 447 F.2d at 30. Here, in contrast, Quinn did not testify after entering his guilty plea, and Judge Lasker carefully instructed the jury that the presumption of innocence still attached to McAvoy and that the jury was to consider only the evidence against him. McAvoy can claim neither error nor prejudice in this procedure.

#### POINT IV

##### **The Sentence Imposed by Judge Lasker Was Proper.**

McAvoy claims that the sentence imposed by Judge Lasker on Counts One and Five of the Indictment—those counts charging violations of 18 U.S.C. § 2113(a)—must be vacated. He argues that because § 2113(a) is a lesser included offense of § 2113(d), convictions under the former statute merge into convictions on the latter. *Prince v. United States*, 352 U.S. 322, 329 (1957). McAvoy thus argues that sentences can be imposed only on Counts Two and Six, which charge violations of § 2113(d).

McAvoy has simply misread the relevant cases governing sentences imposed under § 2113. Judge Lasker was fully apprised of the proper means of imposing sentence under the statute (Tr. of July 1, 1977 at pp. 18-19), and the sentence he imposed was the correct one. Judge Lasker imposed a single sentence on Counts One and Two, and a single sentence on Counts Five and Six. The Court did not impose either concurrent or consecutive sentences on these counts; he imposed one general sentence for each bank robbery.

The general sentence is precisely the remedy prescribed by this Court for the imposition of sentence on multiple subsections of § 2113. The first discussion in this Circuit of sentencing procedures under § 2113 can be found in *Gorman v. United States*, 456 F.2d 1258 (2d Cir. 1972). This Court there stated:

"We conclude that the sensible way out of the dilemma created by *Prince* while providing final appealable judgment on all the counts on which the defendant was convicted, is that adopted by the Third Circuit *en banc* in *Corson*, [*United States v. Corson*, 449 F.2d 544 (3d Cir. 1971)] *supra*. That court decided that a single general sentence would be appropriate and advisable in all multi-count cases under the Federal Bank Robbery Act." 456 F.2d at 1259.

All of the later cases in this Circuit which discuss bank robbery sentencing derive from and expressly cite *Gorman*. *United States v. Mariani*, 539 F.2d 915, 917 (2d Cir. 1976); *United States v. Stewart*, 523 F.2d 1263, 1264 (2d Cir. 1975); *United States v. Oliver*, 523 F.2d 253, 260 (2d Cir. 1975); *United States v. Pravato*, 505 F.2d 703, 705 (2d Cir. 1974).

*Gorman* in turn derives from *United States v. Corson*, 449 F.2d 544 (3d Cir. 1971), the most extensive appellate



treatment of the various sentencing alternatives available under § 2113. The *Corson* court considered and explicitly rejected the remedy proposed by McAvoy of imposing sentence only on one subsection of § 2113. 449 F.2d at 550. The Court held that in order for a defendant to appeal his convictions on several subsections of the statute, judgment had to be entered on each subsection. The Court further held that:

“[T]he entry of a valid appealable judgment of conviction on each count required that sentence be imposed thereon. . . . ‘Final judgment in a criminal case means sentence. The sentence is the judgment.’ *Berman v. United States*, 302 U.S. 211, 212 (1937). See Federal Rules Criminal Procedure 32(b).” 449 F.2d at 550.

The Third Circuit concluded that sentence had to be imposed on all subsections of § 2113. The Court further reasoned that imposition of sentence on a single subsection only might enable a defendant to escape punishment entirely were his conviction on that particular subsection reversed on appeal. The Court thus concluded that the proper solution was the imposition of a single general sentence on all subsections. 449 F.2d at 551.

This Court in *Gorman* explicitly embraced the Third Circuit's reasoning in *Corson*, as other courts have as well. See *Johnson v. United States*, 495 F.2d 652, 653 (8th Cir. 1974); *Gerberding v. United States*, 471 F.2d 55, 61-63 (8th Cir. 1973); *Choice v. United States*, 415 F. Supp. 369, 370 (E.D. Pa. 1976). Those decisions plainly defeat McAvoy's argument and make clear that the form of sentence imposed by Judge Lasker was proper in all respects.

**CONCLUSION**

**The judgment of conviction should be affirmed.**

Respectfully submitted,

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Southern District of New York,  
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Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York     )  
County of New York    )

*Jeremy G. Epstein* being duly sworn,  
deposes and says that he is employed in the office of  
the United States Attorney for the Southern District of  
New York.

*two* That on the *5th* day of *December*, *1977*  
he served a copy of the within *brief*  
by placing the same in a properly postpaid franked  
envelope addressed:

*Jonathan J. Silbermann Esq.*  
*Legal Aid Society*  
*Federal Defender Services Unit*  
*509 United States Courthouse*  
*Foley Square*  
*New York, New York 10007*

And deponent further says that he sealed the said en-  
velope and placed the same in the mail drop for  
mailing in the United States Courthouse Annex,  
One St. Andrew's Plaza, Borough of Manhattan, City  
of New York.

*Jeremy G. Epstein*

Sworn to before me this

*5TH* day of *December*, *1977*

*Maria A. Israelian*

MARIA A. ISRAELIAN  
Notary Pub. c. State of New York  
No. 31-4521851  
Qualified in New York County  
Term Expires March 30, 1978



